LIBRARY
SUPREME COURT, U. S.

FILED
APR 15 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1276

GERARDO A. RE, aslo known as JERRY A. RE, and GERARD F. RE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DANIEL H. GREENBERG,
Counsel for Petitioners,
110 East 42nd Street,
New York, New York 10017.
OXford 7-3280

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes and Rules Involved	2
Statement of the Case	5
Prior Proceedings	5
The Present Proceeding	9
The Record	10
Reasons for Granting the Writ	11
Conclusion	17
Appendix A	18
Appendix B	26
Appendix C	27

Table of Cases

Brookhart v. Janis, 384 U. S. 1 (1966) 14, 15

Hair v. United States, 289 F. 2d 894 (D. C. Cir., 1961) 17

In re Oliver, 333 U. S. 257, 268-270 (1948) 14

Johnson v. Zerbst, 304 U. S. 458, 464 (1938) 14

Jones v. United States, 362 U. S. 257 (1960) 16

Levine v. United States, 362 U. S. 610, 616 (1960) .. 14

Machibroda v. United States, 368 U. S. 487 (1962) .. 2, 11, 12

PAGE

McDonald v. United States, 335 U. S. 451 (1948) 16

Nelson v. United States, 208 F. 2d 504 (D. C. Cir., 1953) 17

People v. Anderson, 16 N. Y. 2d 282 (1965) 15

Poe v. United States, 233 F. Supp. 173 (D.C.D.C., 1964, opinion by Circuit Judge Wright) 15

Pointer v. Texas, 380 U. S. 400, 404-407 (1965) 13, 15

Rosencranz v. United States, 334 U. S. 738 (1st Cir., 1964) and 356 F. 2d 310, 313 (1st Cir., 1966) ... 17

Schoeneman v. United States, 317 F. 2d 173 (D. C. Cir., 1963) 17

Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392 (1920) 16, 17

Specht v. Patterson, 35 U.S.L.W. 4340 (decided, April 11, 1967) 15

Spevack v. Klein, 35 U.S.L.W. 4140, 4142 (decided, January 16, 1967) 15

Takahashi v. United States, 143 F. 2d 118 (9th Cir., 1944) 17

Tanksley v. United States, 145 F. 2d 58 (9th Cir., 1944) 14

United States v. Halley, 240 F. 2d 418 (1957) 12

United States v. Hayman, 342 U. S. 205 (1952) ...2, 11, 12

United States v. Indiviglio, 352 F. 2d 276 (2nd Cir., 1965), cert. den. 383 U. S. 907 (1966) 16

United States v. Kobli, 172 F. 2d 919 (3rd Cir., 1949) 14

United States v. Mullen, 329 F. 2d 295 (5th Cir., 1964) 17

United States v. Thomson, 113 F. 2d 643 (7th Cir., 1940) 17

Wong Sun v. United States, 371 U. S. 471 (1963) ... 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

GERARDO A. RE, also known as JERRY A. RE, and GERARD F. RE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Gerardo A. Re, also known as Jerry A. Re, and Gerard F. Re, pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on February 6, 1967.

Opinion Below

The opinion of the Court of Appeals in this case has not yet been reported. This opinion is set forth as Appendix "A" hereto, *infra*.

Jurisdiction

The order of the Court of Appeals was entered on February 6, 1967. A timely petition for rehearing and for

rehearing *en banc* was filed on February 20, 1967. Said petition was denied on March 16, 1967. (See Appendices "B" and "C", *infra.*) The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254(1).

Questions Presented

The following questions are presented in this proceeding:

1. Whether the failure to grant petitioners an evidentiary hearing on their post-convicition petitions was in direct and prejudicial violation of the clear provisions of Title 28, United States Code, § 2255, and this Court's decisions in *United States* v. *Hayman,* 342 U. S. 205 (1952) and *Machibroda* v. *United States,* 368 U. S. 487 (1962):

2. Whether the holding of an *in camera* hearing during the course of petitioners' trial, from which they were specifically excluded in violation of their constitutional rights of witness confrontation and a public trial, and at which they were denied the right to be witnesses and to present evidence in their own behalf, requires a reversal of the judgments of conviction against them.

3. Whether the order suppressing evidence obtained in violation of the Fourth Amendment to the Constitution, entered in this case on behalf of co-defendant Birrell, inures to petitioners' benefit, requiring reversal of the judgments of conviction entered agaist them.

Constitutional Provisions, Statutes and Rules Involved

CONSTITUTION OF THE UNITED STATES

Amendment IV Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . to be confronted with the witnesses against him . . .

TITLE 18, UNITED STATES CODE

§ 3481 Competency of accused

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

§ 455 Interest of justice or judge

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

§ 1651 Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

§ 2255 Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 41.

(e) Motion for return of property and to suppress evidence.

A person aggrieved by an unlawful search and seizure may move the district court for the district

in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was now aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

Statement of the Case

Prior Proceedings

On April 2, 1962, petitioners Gerardo A. Re, also known as Jerry A. Re, and Gerard F. Re, were indicted along with five co-defendants, including one Lowell M. Birrell, on charges of conspiracy and substantive counts arising out of the alleged sale of unregistered securities, and the making of alleged false statements to the Securities & Exchange Commission. The case was called for trial on May 6, 1963, at which time the government moved to sever the trial of co-defendant Birrell, who was then residing in Brazil. Over the objections of petitioners and their co-defendants, then about to go to trial, this motion was granted. At the same time the trial of the false statements

counts (counts 4, 5, 6, 7 and 8) were severed and these counts have never been tried.

At the trial, petitioners were convicted and sentenced to serve six months' imprisonment and fined $15,000 each. They were also placed on probation for three years each. They appealed to the Court of Appeals for the Second Circuit, and on July 24, 1964, the judgments of conviction were affirmed (336 F. 2d 306). Certiorari was denied by this Court on November 9, 1964 (379 U. S. 904). During all of the prior proceedings in this case petitioners were represented by the same counsel. After petitioners completed their prison sentences and paid their fines, they entered upon the service of their three-year probationary periods, which are still in force.

During November 1964, co-defendant Birrell, who had in the meantime returned to the United States, filed a pretrial motion pursuant to Rule 41(e), Federal Rules of Criminal Procedure, to suppress the bulk of the evidence used at the trial, which had been seized from him in Bucks County, Pennsylvania. This motion was heard by District Judge Inzer B. Wyatt, of the Southern District of New York, and on June 11, 1965, Judge Wyatt filed an opinion suppressing the use as evidence of all of these records. This opinion is reported at 242 F. Supp. 191. The government has conceded that this evidence was necessary and material to petitioners' prosecution and does not claim that its use constituted harmless error (Appellants' Appendix, p. 27a, submitted with this petition).

During the course of the trial it came to petitioners' attention that their former attorney, Milton S. Gould, Esq., had furnished from his files to the government an exhibit of material nature, and that said exhibit was furnished by Mr. Gould ostensibly on behalf of his client, one Nahum Birnbaum, a witness called by the government against petitioners. When petitioners learned of this fact they so advised their trial counsel, who thereupon reported

to the trial judge this apparent violation by this lawyer of the canons of ethics and the rules relating to the conflict of interests by an attorney. Counsel for petitioner Gerardo A. Re asked the trial judge for an evidentiary hearing on the matter.

Thereupon an evidentiary hearing was held *in camera*, in the private chambers of the trial judge, with petitioners specifically excluded therefrom. At this secret hearing the transcript of the testimony was ordered sealed by the trial judge. Witnesses were called to testify, all of whom gave testimony in the absence of all defendants then on trial. Mr. Gould testified concerning his attorney-client relationship with petitioners, but they were not permitted to be present at this examination. Parenthetically, it should be noted that persons other than the defendants on trial were permitted by the trial judge to be present at all sessions of this evidentiary hearing, and that these persons included government witnesses and investigators, as well as the attorneys for various defendants.

Petitioners were never advised, either by their own lawyers or the court, of their absolute constitutional right to be present at this evidentiary proceeding, to their right of confrontation of the witnesses called at the hearing, including their former attorney Gould, and of their right to contradict Gould's testimony by their own testimony and by other evidence in their possession which would refute his testimony.

Until this present proceeding was under way in the district court, petitioners did not learn what had actually taken place at the secret hearing, for the complete transcript of those proceedings had been kept secret from them. A portion of the sealed transcript had been reprinted in their appendix on their direct appeal from the judgment of conviction (with the names of Mr. Gould and his law firm deleted to protect the guilty); but until this proceeding was started, they did not know that the re-

printed portions of the sealed transcript included most or all of Gould's testimony.

As for the implications of Mr. Gould's testimony, these were never fully explained to or made clear to petitioners until this proceeding was already filed in the district court.[1] Although petitioners' prior counsel made much of Mr. Gould's duplicity in the original appeal filed on behalf of petitioners (See 336 F. 2d 306, 318-319), nevertheless these arguments were made on a record which did not contain any evidence supplied by petitioners; and instead, contained testimony by Gould and others given in petitioners' absence from the hearing. Thus, because of petitioners' absence from the hearing there was no confrontation of witnesses as to any of this testimony. Consequently, the record before the Court of Appeals from the original judgment of conviction was based solely on testimony given in isolation from petitioners' scrutiny and personal knowledge, which was not contradicted in any way. No wonder the Court of Appeals was able to make the following finding with respect to this matter in its opinion:

> "We conclude that the conduct of Mr. Z (Gould's masked identity) was not improper and *that appellants have failed to show* that his professional relationship with Birnbaum prejudiced their defense in any manner. Their claim on this point falls well short of the mark that would justify reversing the convictions." (336 F. 2d 306, 319) (Emphasis supplied.)

It was not any error in trial tactics which led to petitioners' absence from the secret hearing, but rather a deliberate and calculated plan by their trial counsel and the trial judge, with the acquiescence of the government attorneys,

---

[1] The allegations of this attorney's duplicity and clear violation of the canons of ethics and conflict of interest were set forth in the Supplemental Petition, dated March 22, 1966 (App. App. 8a, 15a-16a).

to protect the former lawyer Gould, which led to their exclusion from this hearing. Nowhere in the record of the original trial is there any statement or other indication that petitioners' absence from said hearing was voluntary and intentional on their part; or that they knowingly absented themselves therefrom. Nor is there any statement in the record that petitioners knowingly waived their rights to be witnesses at said hearing. On these crucial points the record is strangely silent.

The Present Proceeding.

The present proceeding was instituted by the filing of a verified petition by petitioners seeking a writ in the nature of a writ of error *coram nobis,* under the provisions of Title 28, United States Code, § 1651. This petition was filed on March 14, 1966 (App. App. 8a, 9a-14a). Said original petition was based on the principal contention that the district court had ordered the evidence illegally seized from co-defendant Birrell to be suppressed as evidence in the same indictment; and that petitioners' convictions were principally based upon the receipt in evidence of said documentary proof against them. After this petition was filed, petitioners' present counsel learned of the secret *in camera* hearing described hereinabove. Upon learning these facts, and his further investigation, petitioners filed a supplemental petition on March 22, 1966 (App. App. 8a, 15a-16a).

At a preliminary hearing on these petitions before the district court on March 29, 1966, the district judge directed that petitioners file a statement of particulars with respect to their contentions. This statement was filed under date of April 20, 1966, and petitioners therein requested that District Judge Dudley B. Bonsal be disqualified from further participation in said proceedings under the provisions of Title 28, United States Code, § 455, for the reason that said judge would be a necessary and material witness at the evidentiary hearing to be held on the petition and supplemental petition. Petitioners stated that they

intended to call Judge Bonsal as a witness, in order to explore all the facts and circumstances relating to the conduct of the *in camera* hearing. In addition, said statement of particulars elaborated on petitioners' claim that their constitutional rights to confrontation of witnesses, to a public trial, to appear and give testimony at said hearing, were willfully denied to them. Petitioners also stated that they had not waived their rights and that their counsel could not have waived their rights with respect to the conduct of said hearing, and also with respect to the use of the Birrell records which in the meantime had been adjudicated to have been illegally seized. The government submitted an answering affidavit (App. App. 23a-30a), to which petitioners' counsel replied, wherein it was further requested that a hearing on the entire matter be held before some other judge of the district court, so that petitioners' allegations with respect to their petitions could be adjudicated.

Instead of calling for an evidentiary hearing on this matter, District Judge Bonsal himself denied the motion, stating that there was no issue of fact for trial or other hearing. In so doing Judge Bonsal himself made findings of fact based upon his own conduct in the matter; however, he did not permit or give petitioners any opportunity to prove the allegations of their petitions in this proceeding. The opinion of Judge Bonsal is reprinted at App. App. 37a-43a Judge Bonsal in particular stated that because the record is complete and available "there is no basis for a hearing, nor any need for this judge to testify." (App. App. 43a) Yet nowhere in the records of the trial is there one iota of evidence or other proof setting forth the facts from which this conclusion was reached that the entire matter may be ascertained from the records.

The Record

The record in this case before the Court of Appeals consisted of the entire trial record of the district court, consisting of the original trial transcript and appellate proceed-

ings. The additional paper consisted of the petitions filed herein and the other papers filed with the district court, including the opinion of the district judge. These papers were reprinted as Appellants' Appendix in the Court of Appeals, nine printed copies of which have been filed with this court.

Reasons for Granting the Writ

The reasons for granting the writ in this case relate to the protection of the constitutional rights of petitioners and to the proper administration of federal criminal justice.

1. The failure to grant petitioners an evidentiary hearing on their post-conviction petitions was in direct and prejudicial violation of the clear provisions of Title 28, United States Code, § 2255, and this Court's decisions in *United States* v. *Hayman*, 342 U. S. 205 (1952) and *Machibroda* v. *United States*, 368 U. S. 487 (1962). Although the petitions herein were filed under the All Writs Act (28 U.S.C. § 1651), all parties agree that it was appropriate to consider these petitions under 28 U.S.C. § 2255, since petitioners are still serving the probationary period imposed as part of their sentence in the district court. There is no distinction between these two statutes insofar as the relief available to petitioners is concerned. Thus petitioners' allegations that they were expressly excluded from the *in camera* hearing without their consent, and were thus denied the right of confrontation, the right to a public trial on these matters, and the right to present evidence on their own behalf at said hearing, all in contravention of their constitutional rights, required that a hearing be held before the district court on these allegations. This Court so held in less appealing circumstances in the cases of *United States* v. *Hayman, supra*, and *Machibroda* v. *United States, supra*.

Since Judge Bonsal in the district court set forth his version of the facts of what transpired with respect to

petitioners' absence from the *in camera* hearing, petitioners were entitled to test that version of a meaningful hearing. Cases decided by the Second Circuit so provide; see e.g., *United States* v. *Halley,* 240 F. 2d 418 (1957). In the *Hayman* case, *supra,* this Court held that the district court erred in determining factual issues raised by a motion under § 2255 without notice to respondent and without his presence:

> "We hold that the required hearing can be afforded respondent under the procedure established in Section 2255." (342 U. S. 205, 223)

Thereafter in the *Machibroda* case, *supra,* this Court reiterated its holding in *Hayman,* stating:

> "This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the 'files and records' in the trial court. The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the Government's response, related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection." (368 U. S. 487, 494-495)

In affirming the denial of an evidentiary hearing to petitioners in this proceeding, Circuit Judge Hays of the Court of Appeals wrote:

> "Appellants' absence from the hearing was *apparently entirely voluntary* and they would have been admitted had they presented themselves." (Emphasis supplied.)

Thus, too, the Court of Appeals made findings of fact without any record based on an evidentiary hearing before it.

Petitioners' precise complaint in this case is that they *were* specifically excluded from the *in camera* hearing and had no knowledge of the testimony given thereat until long afterwards. Petitioners contended below and repeat in this Court, that had they been permitted to be present at said hearing they would have established a violation by their former attorney Gould of the canons of ethics and the rules against conflict of interests between themselves and his other client Birnbaum, one of the principal witnesses against them at the trial. They would have thereupon presented substantial evidence, both documentary proof and by verbal testimony, to the effect that their former attorney Gould did in fact act in a manner which substantially prejudiced their defense at the trial herein. They would also have shown at this hearing that their then trial counsel kept them from attending the *in camera* hearing, stating that they should not be inside the hearing room, thereby preventing them from learning what was occurring thereat. He failed to tell them that they had an absolute constitutional right to be present at this hearing, and consequently he acted in complete derogation of their constitutional rights. In fact petitioners remained outside the door of the hearing room during the course of the various sessions of the hearing, waiting to be called inside if their counsel saw fit. This fact was clearly establishable by competent proof. Petitioners also would have shown that the trial judge completely ignored their constituitional rights to confrontation of witnesses and to be present at all stages of a trial at which evidence is taken, so as to enable them to meet the issues raised thereat. Petitioners state that the entire affair was conducted in a manner reminiscent of Star Chamber Proceedings of the English Courts of the Reign of King Henry VIII and his successors.

This Court has held that an accused is entitled to be confronted by the witnesses against him, and the failure of said confrontation constitutes a clear violation of the Sixth Amendment, *Pointer* v. *Texas*, 380 U. S. 400, 404-

407 (1965); *Brookhart* v. *Janis*, 384 U. S. 1 (1966). In the *Brookhart* case, this Court reversed a conviction where the accused was present in open court while his lawyer purported to waive his constitutional rights to confrontation of witnesses. This Court, relying upon the leading case of *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938), held that there is a presumption against the waiver of constitutional rights, and for a waiver to be effective, it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege. In this proceeding petitioners were denied the right to make out their case at a meaningful hearing before the district court. Instead all controverted issues of fact were resolved against them without any hearing at all on the matter. For these reasons at least, certiorari should be granted and this case heard by this Court on its merits.

2. The holding of an *in camera* hearing during the course of petitioners' trial, from which they were specifically excluded in violation of their constitutional rights of witness confrontation and a public trial, and at which they were denied the right to be witnesses and to present evidence in their own behalf, requires a reversal of the judgments of conviction against them. The Sixth Amendment to the Constitution provides for speedy and public trials for an accused, as well as the confrontation of the accused by the witnesses against him. Such public trial is an absolute right explicity guaranteed by said amendment, *Levine* v. *United States*, 362 U. S. 610, 616 (1960).

In the failure to afford a defendant a public trial, no prejudice need be shown to warrant the vacation of a judgment of conviction, *United States* v. *Kobli*, 172 F. 2d 919 (3rd Cir., 1949); *Tanksley* v. *United States*, 145 F. 2d 58 (9th Cir., 1944). Cf., *In re Oliver*, 333 U. S. 257, 268-270 (1948). As has been discussed hereinabove, the failure to confront an accused with the witnesses against him also constitutes a clear violation of the Sixth Amendment,

Pointer v. *Texas, supra; Brookhart* v. *Janis, supra.* There was no reason in fact or law for holding the hearing relating to Mr. Gould's duplicity at a secret hearing in the private chambers of the trial judge. All of the circumstances surrounding the conduct of said hearing should be explored, rather than masked by the secrecy of concealed names, and by a refusal to permit petitioners to expose these improprieties to the clear light of judicial scrutiny. To the same extent, the failure to allow petitioners an opportunity to testify at said hearing was also in violation of their rights, 18 U.S.C. § 3481; *Poe* v. *United States,* 233 F. Supp. 173 (D.C.D.C., 1964, opinion by Circuit Judge Wright).

This case does not involve the situation of a chambers or side-bar conference among court and counsel held with the defendants absent and without their objection; rather the situation was that of holding an evidentiary hearing on an integral part of the case in the privacy of the judge's personal chambers, at which witnesses were sworn and testimony taken, with the record ordered sealed, the public excluded and the defendants themselves involuntarily excluded from attendance at the various sessions of the hearing. In less appealing circumstances, the New York Court of Appeals recently held that conducting a pre-trial hearing to suppress evidence with the defendant absent constitutes a violation of his rights to be confronted by the witnesses against him, thereby requiring reversal of the conviction. *People* v. *Anderson,* 16 N. Y. 2d 282 (1965).

This Court recently held that a failure to allow an accused an opportunity to participate in a meaningful hearing violates the Due Process clause of the Fifth Amendment. See e.g., *Specht* v. *Patterson,* 35 U.S.L.W. 4340 (decided, April 11, 1967); and *Spevack* v. *Klein,* 35 U.S.L.W. 4140, 4142 (decided, January 16, 1967).

For the fundamental violation of petitioners' constitutional rights in these proceedings, the judgments of con-

viction originally entered against them should be reversed and a new trial ordered. This matter warrants review by this Court, and for this reason also, certiorari should be granted.

3. The order suppressing evidence obtained in violation of the Fourth Amendment to the Constitution, entered in this case on behalf of co-defendant Birrell, inures to petitioners' benefit, requiring reversal of the judgments of conviction entered against them. The government has conceded in this proceeding that the use of the so-called Birrell records was material and necessary to petitioners' convictions, and that their use did not constitute harmless error. The Court of Appeals has held that petitioners' failure to urge at their trial that the Birrell records had been illegally seized, constitutes a waiver of this point, citing its own decision in *United States* v. *Indiviglio*, 352 F. 2d 276 (2nd Cir., 1965), cert. den. 383 U. S. 907 (1966).

Nevertheless, this Court held many years ago in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920), that an order suppressing evidence as having been illegally seized requires that said evidence shall not be used at all, and that the protective umbrella of the Fourth Amendment is to be extended to persons not having a conventional possessory interest in said property. This principle was further extended by this Court in *McDonald* v. *United States*, 335 U. S. 451 (1948). The holdings in *Jones* v. *United States*, 362 U. S. 257 (1960), and *Wong Sun* v. *United States*, 371 U. S. 471 (1963), are not contrary.

The government has relied upon the fact that there was a severance of trial as between Mr. Birrell and these petitioners, and that accordingly the government's illegal conduct leading to the illegal seizure of the Birrell records cloaks said misconduct with an immunity veil which petitioners cannot penetrate. Other courts have held to the contrary, following this Court's lead in both *Silverthorne*

Lumber Co., supra, and *McDonald, supra.* See e.g., *Hair* v. *United States,* 289 F. 2d 894 (D. C. Cir., 1961); *Takahashi* v. *United States,* 143 F. 2d 118 (9th Cir., 1944); *United States* v. *Thomson,* 113 F. 2d 643 (7th Cir., 1940); *Nelson* v. *United States,* 208 F. 2d 504 (D. C. Cir., 1953); *Schoeneman* v. *United States,* 317 F. 2d 173 (D. C. Cir., 1963); *Rosencranz* v. *United States,* 334 U. S. 738 (1st Cir., 1964) and 356 F. 2d 310, 313 (1st Cir., 1966); *United States* v. *Mullen,* 329 F. 2d 295 (5th Cir., 1964).

The issues in this particular point involve a basic problem of the proper dimensions of the Fourth Amendment, and is a matter which commends itself to the further judicial scrutiny of this Court. Accordingly, certiorari should be granted on this point.

CONCLUSION

For all of the foregoing reasons, this petition for writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

DANIEL H. GREENBERG,
Counsel for Petitioners.

April 12, 1967.

Appendix A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 208—September Term, 1966.

(Argued November 17, 1966 Decided February 6, 1967.)

Docket No. 30710

UNITED STATES OF AMERICA,

Appellee,

—v.—

GERARDO A. RE, also known as JERRY A. RE and GERARD F. RE,

Appellants.

Before:

WATERMAN, MOORE and HAYS,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge,* denying appellants' motion under 28 U. S. C. § 1651 to set aside judgments of conviction and vacate sentences previously imposed.

Affirmed.

DAVID M. DORSEN (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Robert L. King, Assistant United States Attorney, on the brief), *for Appellee.*

DANIEL H. GREENBERG, New York, New York, *for Appellants.*

Appendix A

HAYS, *Circuit Judge*:

Gerardo A. Re and Gerard F. Re appeal from an order of the United States District Court for the Southern District of New York denying their motion under 28 U. S. C. § 1651, the all writs statute, for a writ in the nature of a writ of error *coram nobis*. Appellants were convicted of violating the Securities Act of 1933 and the Securities Exchange Act of 1934. This court affirmed their convictions, 336 F. 2d 306 (1964) and the Supreme Court denied certiorari, 379 U. S. 904 (1964). They now attack their convictions on the ground that at their trial they were denied certain constitutional rights. We find no merit in appellants' contentions and therefore affirm the order denying their motion.

Since appellants are on probation they are in custody and are entitled to seek a remedy under 28 U. S. C. § 2255.[1]

---

[1] § 2255. *Federal custody; remedies on motion attacking sentence.*

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside, and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(*continued on following page*)

Appendix A

See *United States* v. *Washington,* 341 F. 2d 277, 280 (3d Cir.), cert. denied sub nom. *DeGregory* v. *United States,* 382 U. S. 850 (1965); cf. *United States ex rel. Brewer* v. *Maroney,* 315 F. 2d 687 (3d Cir. 1963); *Dillingham* v. *United States,* 76 F. 2d 35 (5th Cir. 1935). We treat their motion as having been made under that section.

I.

Appellants' first contention is that their constitutional rights were invaded when certain records were used as evidence against them. These records consisted of cash books maintained by one Birrell. Birrell was originally indicted along with appellants but his trial was severed because at the time of appellants' trial he was a fugitive from justice.

At their trial appellants objected to the admission of the cash books on the ground that they should be excluded as hearsay. On the appeal from their conviction this court held that the cash books were properly admitted as business records. 336 F. 2d at 312-314.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A writ of error coram nobis is available to one who has been released from custody. See *United States* v. *Morgan,* 346 U. S. 502 (1954); *United States* v. *Garguilo,* 324 F. 2d 795, 796 (2d Cir. 1963).

Two years after appellants' conviction a motion by Birrell to suppress these records as evidence against him was granted on the ground that the records had been unlawfully seized. *United States* v. *Birrell,* 242 F. Supp. 191 (S. D. N. Y. 1965); 243 F. Supp. 36 (S. D. N. Y. 1965).

Appellants contend that they are entitled to take advantage of the suppression of Birrell's records, i.e. that their conviction must be set aside because the records which were suppressed as to Birrell were used against them.

Since appellants did not move at their own trial to suppress this evidence although they were aware of the circumstances in which it was obtained, appellants cannot now raise the claim of illegal seizure. *United States* v. *Indiviglio,* 352 F. 2d 276 (2d Cir. 1965), cert. denied, 338 U. S. 907 (1966). Moreover,

> "[A] § 2255 proceeding does not serve the office of an appeal. Butler v. United States, 340 F. 2d 63 (8 Cir. 1965) [cert. denied, 382 U. S. 847 (1965)] and cases there cited; Glouser v. United States, 296 F. 2d 853, 856 (8 Cir. 1961) [cert. denied, 363 U. S. 825 (1962)]. And it is settled that the question whether evidence was seized illegally ordinarily may not be successfully raised in a proceeding which constitutes a collateral attack on the sentence, but must be presented in the appeal from the conviction." *Springer* v. *United States,* 340 F. 2d 950, 951 (8th Cir. 1965); *United States* v. *Jenkins,* 281 F. 2d 193 (3d Cir. 1960); *Kyle* v. *United States,* 266 F. 2d 670, 672 (2d Cir. 1959), cert. denied, 361 U. S. 870 (1959).

In any event appellants' claim lacks substantial merit. They had no personal or proprietary interest in these records and therefore no standing to secure their suppression. *Wong Sun* v. *United States,* 371 U. S. 471, 491-92 (1963); *United States* v. *Bozza,* 365 F. 2d 206, 222-23 (2d Cir. 1966);

United States v. *Granello*, 365 F. 2d 990, 996 (2d Cir. 1966), petition for cert. filed 35 U. S. L. Week 3175 (U. S. Nov. 15, 1966) (No. 750).

II.

Appellants' second contention is that they were wrongfully excluded from a hearing which took place in the trial judge's chambers and which was concerned with a possible conflict of interest of an attorney who had formerly represented them. This procedure, they claim, deprived them of their constitutional right to a public trial and to be confronted by the witnesses against them.

We need not decide whether appellants had a constitutional right to be present and to confront their former counsel at the hearing concerning his conflicting interests. Compare *Snyder* v. *Massachusetts*, 291 U. S. 97 (1934); *Stein* v. *United States*, 313 F. 2d 518, 522 (9th Cir. 1962), cert. denied, 373 U. S. 918 (1963); *Glouser* v. *United States*, 296 F. 2d 853 (8th Cir. 1961), cert. denied, 363 U. S. 825 (1962); *Cox* v. *United States*, 309 F. 2d 614, 615-16 (8th Cir. 1962) and *People ex rel. Lupo* v. *Fay*, 13 N. Y. 2d 253, 196 N. E. 2d 56, 246 N. Y. S. 2d 399 (1963), cert. denied, 376 U. S. 958 (1964) with *Pointer* v. *Texas*, 380 U. S. 400 (1965) and *People* v. *Anderson*, 16 N. Y. 2d 282, 213 N. E. 2d 659, 266 N. Y. S. 2d 110 (1965). Appellants waived any such right to be present by failing to object to their alleged exclusion either at the trial or upon direct appeal. See *Stein* v. *United States, supra*, 522 (9th Cir. 1962) (alternative holding); *Kyle* v. *United States, supra*, 266 F. 2d at 672; *United States* v. *Jenkins, supra*, 281 F. 2d at 193-94.

Moreover, "it is only when there has been the *denial of the substance of a fair trial* that the validity of the proceedings may be . . . collaterally attacked or questioned by motion in the nature of a petition for writ of error coram nobis or under 28 U. S. C. A. 2255." *Glouser* v. *United States, supra*, 296 F. 2d at 856, quoting *Howell* v. *United*

States, 172 F. 2d 213, 215 (4th Cir.), cert. denied, 337 U. S. 906 (1949).

Appellants' absence from the hearing was apparently entirely voluntary and they would have been admitted had they presented themselves. Their counsel attended the hearing and appellants had access to the entire transcript of the hearing before their first appeal and indeed reprinted it in their appendix on that appeal. The issue considered at the hearing was before this court on the previous appeal. We concluded that no impropriety or prejudice to appellants had been shown.[2] The question of appellants' absence from the hearing was not raised by counsel nor by appellants themselves at any time during the earlier proceedings.

Appellants' claim that hearing the conflict of interest matter in chambers constituted denial of a public trial is equally without merit. *Hayes* v. *United States,* 296 F. 2d 657, 668 (8th Cir. 1961), cert. denied, 369 U. S. 867 (1962).

In these circumstances, the "motion . . . files and records of the case conclusively show that [appellants are] entitled to no relief"[3] and the trial court correctly denied them a hearing. *Simmons* v. *United States,* 302 F. 2d 71, 80 (3d Cir. 1962); *Burley* v. *United States,* 295 F. 2d 317 (10th Cir. 1961).

III.

Appellants argue that the District Judge should have disqualified himself under 28 U. S. C. § 455,[4] since he would be a material witness at any evidentiary hearing held to determine the circumstances of their absence from the conflict of interest hearing. "[T]he literal terms of 28 U. S. C.

---

[2] 336 F. 2d at 318-19.

[3] 28 U.S.C. § 2255. See *supra* note 1.

[4] § 455. *Interest of justice or judge.*

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness . . . .

§ 455 (1958) require disqualification only if the judge *is* a witness." *United States* v. *Hughes*, 325 F. 2d 789, 792-93 (2d Cir.), cert. denied, 377 U. S. 907 (1964). Here, the trial judge properly denied appellants a hearing and therefore the occasion for his testimony never arose. We need not decide the extent to which considerations of efficient judicial administration and particularly "the purpose of section 2255 . . . to permit the trial judge, because of his familiarity with the proceedings and ability to supplement the record," may limit the scope of Section 455. See *United States* v. *Smith*, 337 F. 2d 49, 51-54 (4th Cir. 1964), cert. denied, 381 U. S. 916 (1965).

The order denying appellants' motion is affirmed.

WATERMAN, *Circuit Judge* (concurring):

I concur in affirming the denial of appellants' motion, and concur in my brother Hays's opinion disposing of two of appellants' three claims: the claim that appellants' constitutional rights were invaded when Birrell's cash books were admitted into evidence at trial, and the claim that Judge Bonsal should have disqualified himself from acting upon their motion.

However, I do not find enough in any record to satisfy me that appellants, at the time when their trial counsel arranged for the *in camera* hearing relative to Mr. Z, would have been admitted to Judge Bonsal's chambers, or to satisfy me that they voluntarily excluded themselves from attendance knowing what testimony was there to be taken. Therefore, I do not agree that appellants at trial intentionally relinquished a constitutional right that they were aware of at that time.

I do agree that they are fully chargeable with awareness and knowledge of the contents of the printed appendix they

filed with us when they took their direct appeals, *United States* v. *Re*, 336 F. 2d 306 (2 Cir.), *cert. denied*, 379 U. S. 904 (1964), from their convictions, which appendix contained the complete transcript of the *in camera* hearing. The issue appellants now seek to raise collaterally was implicit in the claims made to us on the direct appeal, *United States* v. *Re*, *supra* at 318-319; and the trial court, in view of our previous disposition of the issue, properly denied this collateral motion. See *United States* v. *Marchese*, 341 F. 2d 782, 789 (9 Cir.), *cert. denied*, 382 U. S. 817 (1965); *Matysek* v. *United States*, 339 F. 2d 389, 391 (9 Cir. 1964), *cert. denied*, 381 U. S. 914 (1965); *Stein* v. *United States*, 313 F. 2d 518, 522 (9 Cir. 1962), *cert. denied*, 373 U. S. 918 (1963); *United States* v. *Jenkins*, 281 F. 2d 193 (3 Cir. 1960).

Appendix B.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

DANIEL H. GREENBERG,
New York, N. Y., for appellants.

Petition denied.

S.R.W.

L.P.M.

P.R.H.

U.S.C.JJ.

Mar 16 1967

Appendix C.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PETITION FOR REHEARING IN BANC

DANIEL H. GREENBERG,
New York, N. Y., for appellants.

No active circuit judge having requested that a vote be taken on the suggestion that the case be reheard in banc, the same stands denied.

16 March 1967

J. EDWARD LUMBARD
Chief Judge